Supreme Court, U.S.
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No. 92-725

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

SALVADOR GODINEZ, Warden, Ely State Prison, Petitioner,	NV Sup. Ct. #19161
vs.	DC No. C67482 & C67483 Nevada (Las Vegas)
RICHARD ALLEN MORAN, Respondent.	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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II.

STATEMENT OF THE CASE

The Respondent, Moran, adopts the Statement of the Case set forth in Petitioner's Petition for Writ of Certiorari, with the exception to the Petitioner's characterization of State Trial Court Judge Myron Leavitt's plea canvass and Faretta canvass being extensive. In fact, his failure to conduct a Westbrook hearing[1] is the threshold issue of the Ninth Circuit Court of Appeal's opinion in this matter.

At the time of the Petitioner's plea and waiver of counsel, the Petitioner was still recovering from a suicide attempt and told the Court he was on medication. In fact, Moran was heavily medicated on the November change of plea and waiver of counsel court date. Nevertheless, the Court did not conduct any further inquiry into the type and dosage of the medications.

III.

STATEMENT OF FACTS

In the early morning hours of August 2, 1984, Richard Moran and a female companion entered the Red Pearl Saloon in Las Vegas, Nevada.

Present in the bar were the bartender, Sandra Devere, and another employee, Russell Rhoder, who was off-duty, sitting at the bar. Without any warning or apparent provocation, Moran . . .

[1] In Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed. 2d 429 (1966) this Court gave recognition to a distinction between a Defendant's mental competency to stand trial, and his competency to waive his right to counsel at trial.

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removed a .45 caliber automatic pistol from his belt and shot the bartender and the customer four times each.

Moran then carried the cash register from the bar outside to his vehicle and then set several fires inside the bar.

Nine days later, on August 11, 1984, Moran went to the home of his ex-wife, Linda Vandervoort, and again without apparent provocation, fired seven shots at her, five of which entered her body and caused her death.

Moran then turned the gun on himself and fired into his stomach after he had slashed his wrists.

At the time these acts occurred, Moran, an individual with no significant history of prior criminal history, was freebasing cocaine, ingesting quaaludes and drinking scotch. Moran was freebasing approximately two to three grams of cocaine a day.

On September 19, 1984 and on November 28, 1984, Dr. O'Gorman and Dr. Jurasky filed their respective psychiatric reports that Moran was competent to stand trial.

On November 28, 1984, Moran appeared before the honorable Myron Leavitt to change his plea to guilty to three capital murders and discharge his attorney. Moran further refused standby counsel and announced that he wanted no mitigating evidence presented on his behalf at his penalty hearing.

Moran expressed extreme remorse over shooting and killing the two people at the Red Pearl Saloon and the death of his ex-wife Linda Vandervoort.

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On November 28, 1984 at the time that Moran waived his counsel and plead straight-up to the charged offenses, the Court asked Moran if he was under the influence of drugs or alcohol. Moran answered in the affirmative. Incredibly, the Court did not ask any follow-up questions or conduct a competency hearing. Absolutely no further inquiry was made on the subject.

In January 1985 a three-judge sentencing panel sentenced Moran to death.

At the time of the post-conviction hearing in state court in April 1988, the jail medication records were admitted into evidence. The evidence showed that Moran was under the influence of four kinds of medication including Inderal, Dilantin, Phenobarbitol and Vistaril.[2]

Moran testified at the post-conviction proceeding that he was kept in a state of euphoria where he did not care what happened. Moran stated that he did not sober-up until he reached the Nevada State Prison when he was taken off of his medication.

Dr. O'Gorman also testified at the post-conviction hearing that Moran 's heavy usage of cocaine would have precluded . . .

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[2] Inderal, commonly known as a "betablocker," is used in the management of hypertension. Physicians' Desk Reference (42d ed. 1988) at 650-52; Docket No. 26, Exhibit III (PDR excerpts). Dilantin is an antiepileptic drug which inhibits the spread of seizure activity in the motor cortex and is related to barbiturates in its chemical structure. Id. at 1543-45. Vistaril is used for the relief of anxiety and tension associated with psychoneurosis. It acts on certain key regions of the sub-cortical area of the central nervous system. Id. at 1625-26. Phenobarbital is a sedative generally used in conjunction with other drugs to counteract the central nervous system stimulation.

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him from forming the specific intent to commit the crime for which he was convicted.

Dr. O'Gorman further testified that he had not included this information in his report because the report was specifically limited to Moran's competency to stand trial.

IV.

ARGUMENT

I. There Is No Difference Between The Standards Of Competency To Waive Counsel And Plead Guilty But At Most A Disagreement On Terminology.

This Court should not grant certiorari merely to clarify what is at most a disagreement among the circuits over terminology. Although the Court of Appeals refers to its analysis of competence to waive counsel and plead guilty as a "standard", it is in fact nothing but the application of the Dusky standard, Dusky v. United States, 362 U.S. 402 (1960), to the particularly difficult and important decision being made by the defendant in the plea context.

The analysis of rationality under Dusky, is, and must be, intensely context-specific. All commentators analyzing the application of the Dusky standard have recognized that its requirement of rationality will have varying context depending on the character and complexity of the decision the defendant has to make. E.g., B. Ennis, Prisoners of Psychiatry: Mental Patients, Psychiatrist and the Law. 49 (1972); R. Roesch and S. Golding, Competency to Proceed: A Functional and Context-Determinative Decision, 29 J. Forensic Sci. 1119, 1123 (1984); Golding, Roesch and Schreiber, Assessment and Conceptualization of Competency to

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Stand Trial, 8 Law & Hum. Behav. 321, 324, 333 n.2 (1984); Schreiber, Professional Judgment in the Assessment of Competency to Stand Trial: Report of an Evaluation Study, 5 Intl. J. Law & Psychiatry, 331, 332-333 (1982); Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Washington L.REv. 375, 378-379 (1985).

The degree of rationality demanded by the Dusky test for the defendant's competency at trial is appropriately keyed to the extent to which trial proceedings are in the hands of counsel. Counsel is afforded enormous latitude in making tactical decisions at trial, and the degree to which the defendant must be able "to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 401 (1966), relies upon the presence of competent counsel in the judicial proceedings. The decision to plead guilty, however, is significantly more serious: it dispenses altogether with the guiding hand of counsel, which is the main protection against erroneous conviction at trial; and it results in a conviction without any examination of the evidence. The decision to plead guilty thus requires not merely the ability to consult rationally with counsel in a proceeding in which counsel has a significant role. Rather, it requires the defendant to make a knowing and intelligent waiver of the right to have any protection at all, either through the trial process itself or through representation by counsel. This Court has recognized that a "hearing on the issue of [the defendant's] competence to stand trial" is not the same as an inquiry into

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"competence to waive his constitutional right to the assistance of counsel", because of the question whether the waiver is "intelligent and competent." Westbrook v. Arizona, 384 U.S. 150 (1966), quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

The Court of Appeals' analysis, in substance, is nothing more than the application of the Dusky rationality standard to the knowing and intelligent waiver requirements of Westbrook. Such a waiver does require a relatively complex assessment of the possible results of a trial; the benefits and burdens of undergoing a trial; the constitutional right to representation by counsel, confrontation and cross-examination of witnesses, judgement by an impartial jury, and all the other protection afforded by the trial process; and the consequences of foregoing all of those protections. The Court of Appeals' analysis of the defendant's ability to make a "reasoned choice" among the alternatives presented in the plea context is thus merely a restatement of the Dusky requirement that the defendant be able to function in a rational manner with a "rational as well as factual understanding" of the choices with which he is presented. The decision of the Court of Appeals therefore does not present a real conflict with any other decisions, and granting certiorari to resolve what is at most a terminological conflict is unwarranted.

II. The Issue Presented In The Instant Petition For Writ of Certiorari Was Not The Main Thrust of the Circuit Court's Opinion.

In his petition to this Court, Petitioner Godinez argues that the Ninth Circuit's heightened standard of mental

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competency when an individual waives his right to counsel and enters a guilty plea as compared to a hearing to determine competency to stand trial , requires review by this Court.

That issue was not the central rationale in the Circuit opinion.

Contrary to the Petitioner's contention, Moran has previously argued that Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) and Chavez v. United States, U.S. 402, 50 S.Ct. 788, 4 L.ed.2d 824 (1960) applies to entry of plea, there is not a split about the need to determine competency to enter a plea of guilty and waive counsel.

The Circuit's action in the instant case, is but an extension of the Supreme Court's recognition in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) to the distinction between a defendant's mental competency to stand trial and his competency to waive his right to counsel at trial.

In, Sieling v. Eyman, 478 F.2d 211 (1973) the Ninth Circuit noted that it is well settled that a defendant in a criminal trial cannot be deemed to abandon any fundamental constitutional protection unless there is both "an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976) the Court recognized that the standard Rule 11 colloquy may prove an inadequate measure of the validity of a plea proffered by a defendant of questionable mental competence.

. . .

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Similarly in Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978) the Court in applying the Dusky standard held an evidentiary hearing noted that a guilty plea based on a rational decision to accept competent counsel's advise. Hence there is not a real qualitative difference between the Sieling standard and the Dusky standards.

Likewise the Court in United States v. Valentino, 283 F.2d 634 (1960) noted that, "A prisoner should not be permitted to plead guilty if his mental condition is such that he was unable to understand the proceedings before him.

The Court in United States Ex Rel. McGough v. Hewitt, 528 F.2d 339 (1975) noted that an evidentiary hearing should be conducted when questions arise about a petitioner's mental capacity, because the conviction of a person while he is legally incompetent violates due process. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Moreover, in Malinaukas v. United States, 505 F.2d 649 (5th Cir. 1974) although the Court embraced the Dusky standard for mental competence of an accused to voluntarily plead guilty , it also recognized that mere formalistic recitations regarding the voluntariness of a guilty pleas will not suffice.

In United States v. Harlan, 480 F.2d 515 (6th Cir. 1973) the Court acknowledged that a second inquiry into an accused's company is required if the Court is put on notice. In the instant case the Court was indeed put on notice and should have conducted a hearing.

. . .

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The Eighth Circuit likewise held a hearing to determine the competency to enter a plea. In adopting the Dusky standard stated that the issue is one of fact that can only be resolved by an evidentiary hearing. The factors used to determine issue of competency was not utilized in the instant case, i.e., testimony of prior attorneys.

In addition, the Tenth Circuit held that where evidence before the Court raises, a bona fide doubt as to defendant's competency to stand trial or enter a plea the Court must conduct a due process hearing to determine the competency for such purposes.

Most recently, the Eleventh Circuit case United States v. Simmons, 961 F.2d 183 (11th Cir. 1992) likewise looked to whether the plea colloquy provided the trial court with reason to suspect that he did not understand the Court's explanation of the consequences of pleading guilty.

In the case at hand the Court received ample warning that was separate and distinct from the competency to stand trail. There was a significant change from the prior analysis of competency. Mr. Moran had been medicated for Court.

In the context of this case, it is clear that under any standard of rationality the guilty plea and waiver of counsel cannot be considered knowing, intelligent and rational. It is undisputed that the defendant was medicated at the time of the plea, and that he had attempted suicide before his arrest. The psychiatric reports submitted did not address the issue of the defendant's ability to make rational judgments with respect to

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entry of a guilty plea or to waiver of counsel: neither report analyzed the effect of the defendant's long-term drug and alcoholic abuse and of its abrupt termination of his suicide attempt, or of his current medication, upon his ability to make rational choices; and the parts of the reports which expressed doubts about his ability to cooperate rationally with counsel or assist in his defense noted this problem specifically with regard to the defendant's state of guilty, remorse, and depression. See Strafer, Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology, 860, 862-863, 875, 885 (1983); cf.Lenhard v. Woolf, 443 U.S. 1306, 1311-1312 (1979) (Rehnquist, J., in chambers). The subsequent state court proceedings took no account of these factors in connection with the defendant's ability to decide rationally to forego the protection of a trial and representation by counsel, as opposed to the ability to function rationally at trial in cooperation with counsel. Thus whether the Court of Appeals was applying a differential standard to analysis of guilty pleas, or merely the context-specific Dusky standard, that decision would have to be affirmed by this Court. Accordingly, this case is not an appropriate vehicle for this Court to address the question of the appropriate standard, assuming arguendo that there is a conflict is the decisions which is not merely terminological.

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. . .

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V.

CONCLUSION

Respondent Moran submits that there is no qualitative difference in the Ninth Circuits' standard and the Dusky standard as applied in this case. The issue of this case is that due process requires a Court to initiate a competency hearing whenever it has or should have a good faith doubt about a defendants' competency to waive constitutional rights.

Counsel for the Petitioner's unprofessional comments about the Ninth Circuit Court of Appeals is inappropriate and should be struck from the record.

In addition, the Court noted that it is unclear whether the presumption or correctness extends to a state court's finding that a defendant is competent to waive constitutional rights. Creech v. Arave, 947 F.2d 873 (9th Cir. 1891).

For the reasons set forth above the Petitioner's petition for a writ of certiorari should be denied.

DATED this _____ day of November, 1992.

Respectfully Submitted,

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VI.

APPENDIX

Excerpts from Appellant's Opening Brief to the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD ALLAN MORAN, Appellant, vs. SALVADOR GODINEZ, WARDEN, Appellee.	Case Number: 91-15609 APPEAL FROM JUDGEMENT DENYING PETITION FOR WRIT OF HABEAS CORPUS ENTERED IN UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA

APPELLANT'S OPENING BRIEF

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EVIDENCE DOES NOT SUPPORT THE FINDINGS OF THE AGGRAVATING CIRCUMSTANCES. 19

1. THE RANDOMNESS AGGRAVATING CIRCUMSTANCE IS UNSUPPORTED. 20

D. THE TRIAL COURT VIOLATED MORAN'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS IN REFUSING TO FIND THAT MORAN'S MENTAL AND EMOTIONAL STATE OF BEING UNDER THE INFLUENCE OF "LOTSA DRUGS" CONSTITUTED A MITIGATING CIRCUMSTANCE. 22

E. THE TRIAL COURT VIOLATED MORAN'S RIGHT TO DUE PROCESS BY CONSOLIDATING THE TWO UNRELATED ACTIONS AT THE PENALTY HEARING. 23

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requirements of due process of law, a guilty plea must be both voluntary and intelligent. Hill v. Lockhart, 474 U.S. 52 (1985).

Mental competency is basic to the ability of a defendant to enter a voluntary and intelligent plea of guilty. Matusiak v. Kelly, 786 F.2d 536 (2d Cir.), cert. denied, 479 U.S. 805 (1986). Stinson v. Wainwright, 710 F.2d 743 (11th Cir), cert. denied, 464 U.S. 984 (1983). This Court has previously held that a defendant is not competent to plead guilty if his mental state substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of the plea. Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973). Accord Chavez v. United States, 656 F.2d 512, 518-519 (9th Cir. 1981).

During his change of plea, Moran was asked by the trial court if he was "presently under the influence of any drug or alcohol." Moran responded, "Just what they gave me in, you know, medications." CR. 9, Exh. 8, at 12. The trial court neglected any further inquiry into either the type or dosage of medications Moran was referring to, nor saw fit to ask Moran if these prescribed medications were affecting him mentally or emotionally. Nevertheless, the court found Moran's pleas to have been voluntarily entered.

In fact, Moran was heavily medicated during the change of plea proceedings. Moran was taking the prescribed medications Phenobarbital, Dilantin, Inderal and Vistaril. CR. 9, Exh. B, at 34. At his post-conviction hearing, Moran testified that the medications caused his indifference during his change of plea, and

described the effects of these drugs as follows:

> I wouldn't know how to describe it. I guess I really didn't care about anything, you know, it wasn't -- I wasn't very concerned about anything that was going on, you know, as far as the proceedings and everything were going. CR. 9, Exh. B, at 35.

Even without a request from a defense attorney or the prosecutor, the trial court must order an evidentiary hearing to determine the accused's competency to stand trial when the evidence before it raises a reasonable doubt about the defendant's competency. See Chavez, supra.

The question thus becomes whether the trial court should reasonably have questioned Moran's competence when presented with the fact that Moran was medicated during the arraignment, was in the withdrawal stage of a serious drug addiction, had earlier attempted suicide, and was depressed.

Clearly the responsibility for confirming the competency of an accused who wishes to enter a plea of guilty rests in the hands of the trial court. This is so because it is unrealistic to expect a person heavily medicated with mood altering chemicals - prescribed or otherwise - to affirmatively volunteer to the trial court that his decision to enter a guilty plea may be merely the result of his medication, rather than his true intention. Richard Moran and other defendants who are unaware that they are of unsound mind at the time they enter a plea of guilty are precisely the individuals this procedural safeguard is designed to protect. Here, Moran's disclosure of his medicated condition demanded further inquiry by the trial court, yet the comment was simply ignored.

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By neglecting to determine the nature and effect of Moran's medication, the trial court failed to consider evidence which clearly would have raised a reasonable doubt as to Moran's competency. Moreover, the trial court's inexplicable disregard of Moran's medicated state throughout his proceedings has left Moran with little means of proving his prior incompetence at this late stage of his proceedings.

The district court has justified its finding of voluntariness on the fact that "Moran has not presented any evidence to show that the effect that those medications actually had upon him were such that he was not able to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea of guilty." CR. 48, at 8.

If this rationale is to be our guiding principle, and if this is the burden upon defendants we will allow trial courts to create through their own blunder, oversight or omission, then the professed protection of the incompetent accused is a hollow mockery of justice and fairness. In the instant case, Richard Moran is unfairly paying for the consequences of the trial court's error with his life.

Unconstitutional defect in Moran's plea is also demonstrated by the court's strained effort to obtain factual admissions from Moran regarding his commission of the subject crimes. Obtaining a factual basis is supposed to ensure that the court does not accept a guilty plea from a legally innocent defendant who is pleading guilty out of ignorance, feelings of

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VII.

CERTIFICATE OF SERVICE

I, Cal J. Potter, III, Esq., a member of the Bar of the Supreme Court of the United States and counsel of record for Richard Allen Moran, Respondent herein, hereby certify that on November 16, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served copies of the foregoing RESPONDENT'S BRIEF IN OPPOSITION and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each of the parties herein, as follows:

On Salvador Godinez, Warden, Ely State Prison, Petitioner herein, by depositing such copies in the United States Post Office, Las Vegas, Nevada, with first class postage prepaid, properly addressed to the post office address of Frankie Sue Del Papa, Attorney General of the State of Nevada, Brooke A. Nielson, Assistant Attorney General, David F. Sarnowski, Chief Deputy Attorney General and Stuart J. Newman, Deputy Attorney General, the above-named Respondent's counsel of record, at Criminal Justice Division, Capitol Complex, Carson City, Nevada, 89710.

All parties required to be served have been served.

DATED November 16, 1992.

Cal J. Potter, III, Esq.
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